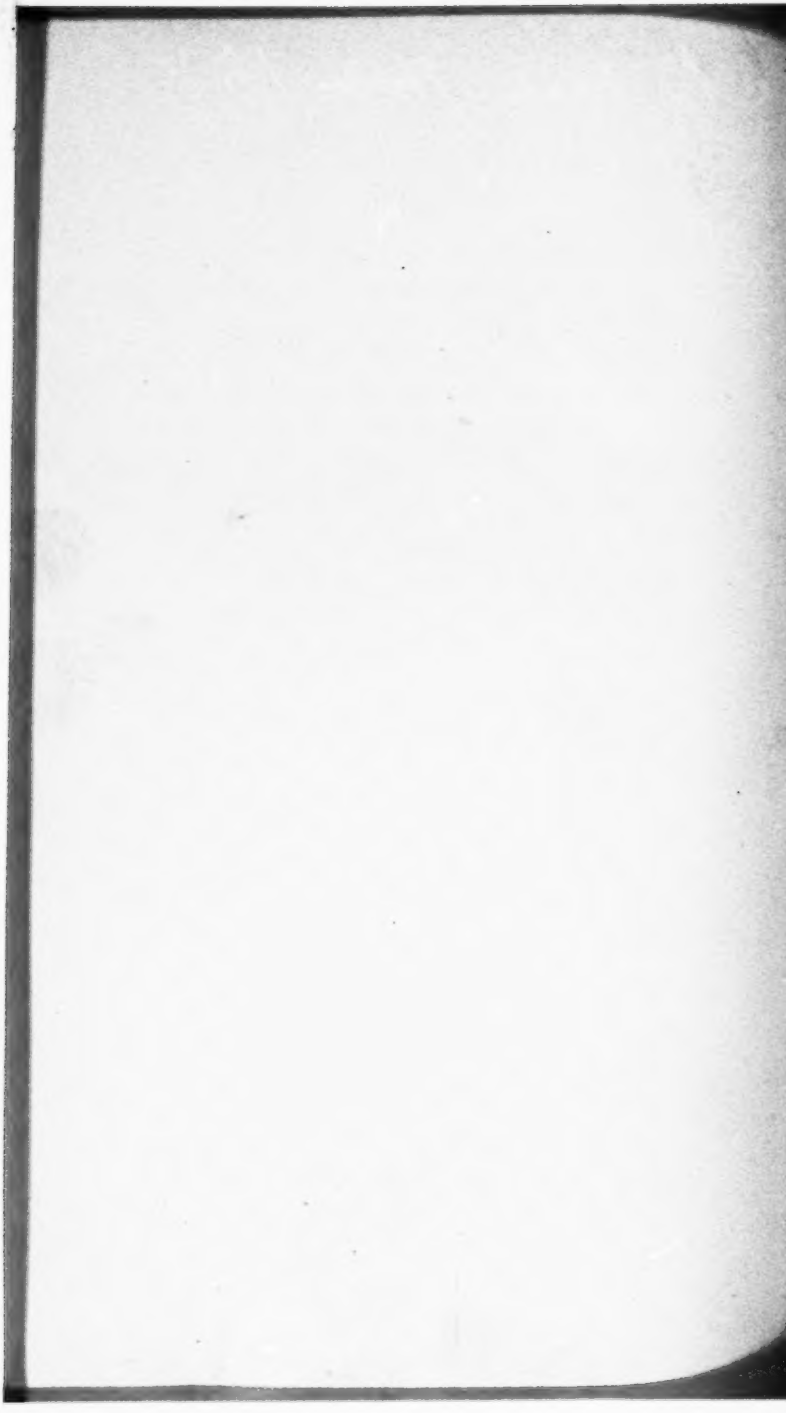


No. 15

Supreme Court of the United States,

OCTOBER TERM, 1899.

Brief of Mr. Ward for Respondent

Filed Oct. 18, 1899

No. 414

Office Supreme Court U. S.
FILED
OCT 18 1899
JAMES H. McKENNEY,
Clerk.

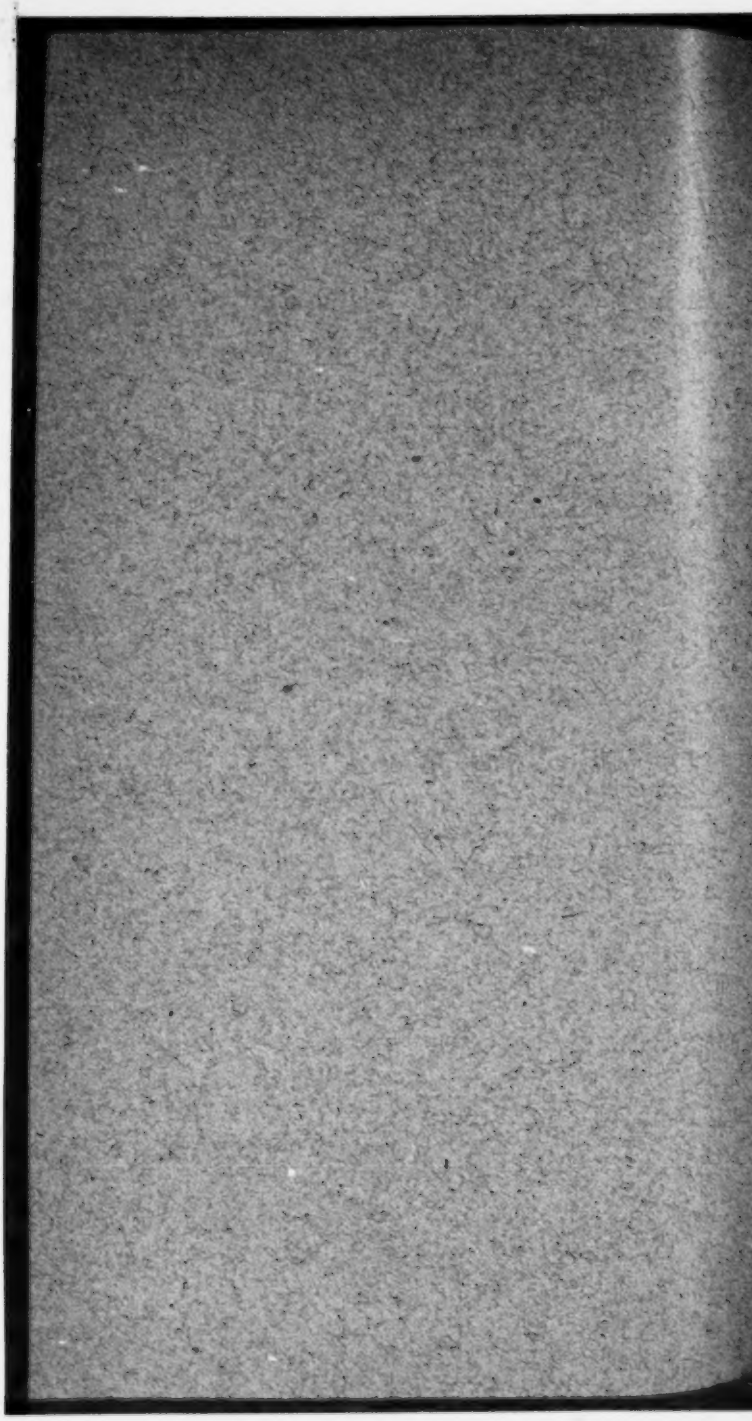
IN THE MATTER

OF

THE PETITION OF LIZZIE STEARNS BLEECKER AND ANOTHER, FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION TO PETITION.

HENRY GALBRAITH WARD,
Of Counsel for INTERNATIONAL NAVIGATION COMPANY,
160 BROADWAY,
NEW YORK.



UNITED STATES SUPREME COURT.

OCTOBER TERM, 1899. No. 414.

IN THE MATTER

of

The Petition of LIZZIE STEARNS BLEECKER and another, for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

MEMORANDUM IN OPPOSITION TO THE PETITION.

To the Honorable the Supreme Court of the United States:

The proctors of the International Navigation Company, claimant of the steamship "Kensington," beg leave to file the following memorandum in reply to the petition of Lizzie Stearns Bleecker and Elsie L. Bleecker for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

The petitioners, in subdivision III. of article XIV., on page 7 of the petition, misdescribe the document there mentioned as a receipt for the ticket, and print but part of it.

The document is, in point of fact, a receipt for the baggage, and for 24 francs in repayment of the railroad

freight to Antwerp which the Company had advanced. It is as follows:

RECEIVED for R. R. carriage and charges on baggage or
EMPFAGEN fur Bahnfracht und Spesen oder auf Gepack
RECU pour port et frais sur bagages ou

L/V		fr	"
"	21358	"	24"
"		"	"
"		"	"
R. R. Baggage check		"	"
Storage Receipt		"	"
: Ocean freight			
For: Ocean freight on excess of Baggage		"	"
:			

Clts Ex. B Total fr.

Weight, contents and value unknown and shipped by the Red Star Line steamer, subject to the conditions contained in the Co's ticket and bill of lading.

RED STAR LINE,
Antwerp
Dec. 97
Caisse.

The reference to the company's bill of lading was in order to cover the case of the passengers stating the value of their baggage to be over 250 francs and paying one per cent. as freight on the value in excess of that amount.

We proceed to consider the questions of law proposed by the petitioners in Article XIV. of the petition, the first being as follows:

"I. Is the following clause, in a ticket purchased in Paris, France, for the transport of a passenger

from Antwerp, Belgium, to the City, County and State of New York, upon an ocean steamship, reasonable, valid and enforceable in a court of the United States, assuming that the Belgian law does not forbid such a contract?

> "The shipowner or agent shall not, under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading in use from the port of departure. All questions arising hereunder are to be settled according to the Belgian law."

We point out that the last sentence is to be found at the very end of the ticket, and is, therefore, here printed out of place; and it is printed omitting the following words, which are a part of it:

> "With reference to which this contract is made."

The circumstance that the contract of transportation was entered into at Paris is not material. Only a part of the passage money was paid there, and the ticket was not to become operative until the balance was paid at Antwerp. The performance of the contract was to begin at Antwerp and to end at New York. Therefore, the law of France at least would not be applicable in any respect.

It will be noticed that both the District Court and the Circuit Court of Appeals have found that this clause was printed on the face of the ticket over the signature of the agent in type, which, though somewhat smaller than the preceding type, was perfectly clear and legible.

This Court, in the case of the "*Majestic*," 166 U. S., p. 375, had under consideration a ticket of the White Star

Line, upon the front of which there was an agreement of *transportation over the signature of the agent*, and on the back of which there was a notice to passengers in seven different paragraphs, one of which was passed upon by the Court. This Court, in a most unmistakable way, held that what was printed on the face of the ticket over the signature of the agent was a contract; whereas, what was printed on the back of the ticket was a mere notice, and therefore not a part of the contract. The opinion begins with these words:

> "By *the contract* in this case the Steamship Company agreed to land libellants with their luggage at the port of New York, and none of the alleged exceptions or conditions were referred to therein. They were notices and nothing more, and it cannot be held as matter of law that whether they were regulations for the conduct of business or limitations upon common law obligations they constituted any part of *the contract*."

The italics are ours.

Accordingly the provision relied upon by the claimant in this case should be taken to be a part of the contract, and therefore the question of its reasonableness, provided only that it is not against public policy, does not arise at all. It is sufficient that the parties have agreed to it.

That it is not against public policy has been decided by this Court after most careful consideration in the case of *Hart* vs. *Pennsylvania Railroad Company*, 112 U. S., 331, where it was held that though a common carrier cannot exempt himself from liability for negligence, yet he may fix a value upon the property carried and limit the amount of his liability to that value, especially if the rate of freight is made proportionate to the value. It resulted in that case that the shipper's offer to show that the extent of his loss was $25,000, whereas under the contract

he received but $1,200, was excluded. This is precisely the arrangement that is made in the clause now before the Court; the baggage is carried free provided it is valued at 250 francs. But if the passenger wishes it to be carried at its real value, then he must pay freight at the rate of one per cent. on the excess value over 250 francs.

It must be admitted that the case of *Richardson, Spence & Co.* vs. *Rowntree*, 1894, Appeal Cases, 217, is not consistent with what we have said nor with the *ratio decidendi* in the case of the "*Majestic.*" It may fairly be described as at least an insufficiently considered case. The Law Lords decided it upon the strength of two prior decisions, one of

Henderson vs. *Stevenson*, H. L. 2 App. Cases, Sc., 470;

Parker vs. *Southeastern* R.R. Co., L. R. 1 C. P. D., 618, 2 C. P. D., 416.

The stipulations which were relied upon by the defendants in those cases were printed upon the back, in the one case upon a steamer ticket which had on it merely "Dublin to Whitehaven," and in the other on a receipt for luggage which was deposited in the luggage office of a railroad company. There was absolutely no ground for saying that what was printed on the face of either of these instruments was the contract, or that what was printed on the back was a part of what was printed on the face. The House of Lords seems to hold that no instrument drawn by one man and given to another can be a contract unless its provisions have been called to the attention of the party who did not prepare it. Of course, we know this is not so in the case of bills of lading and policies of insurance. Whether such an instrument is or is not a contract depends chiefly upon its terms. It is true that most railroad tickets and some steamship tickets, as in the Henderson

case, are mere vouchers. A ticket for ocean transportation, however, is a much more important document; it is a transaction into which people enter with care, and no Transatlantic steamship ticket, as far as we know, is drawn as a voucher. In the ticket now under consideration, above the signature of the agent are contained all the provisions applicable to the transportation, and in its very last clause it is described as a contract. This was the view taken of the ticket of the Cunard Steamship Company in the case of *Fonseca* vs. *The Steamship Co.*, 153 Mass., 553, and by the Court of Appeals of the State of New York in a ticket which was the predecessor of the very one before this Court.

Steers vs. *The Liverpool & N. Y. SS. Co.*, 57 N. Y., 1.

Unless some fraud or deception or concealment is practiced the party accepting such a document is bound by its terms.

It will be observed that the *Richardson* case involved a claim for personal injuries as to which the amount of the company's liability was restricted to $100. And the ticket contained no provision, as in the clause now under consideration, whereby upon payment of a greater sum the company's liability could be proportionately increased.

The condition of the law on this point in England is certainly in an unsatisfactory state. *Sir Frederick Pollock*, in the 6th edition (August, 1894) of his work on the Law of Contracts, speaking of the law of England, and citing among other cases *Richardson* vs. *Rowntree*, says:

> "The result, as it stands at present, appears to be that it is a question of fact whether the notice given in each case was reasonably sufficient to inform the party receiving it at the time of making the contract that the party giving it intended to contract only on special terms. A person who, knowing this, enters

into the contract, is then deemed to assent to the special terms; but this again is probably subject to an implied condition that the terms are relevant and reasonable. It cannot be said that the subject is yet free from doubt."

In the *Fonseca* case the Court said, *inter alia:*

"The principal question before us is whether the plaintiff, by reason of his acceptance and use of his ticket, shall be conclusively held to have assented to its terms. It has often been decided that one who accepts a contract and proceeds to avail himself of its provisions, is bound by the stipulations and conditions expressed in it, whether he reads them or not. (Rice *vs.* Dwight Mfg. Co., 2 Cush., 80; Grace *vs.* Adams, 100 Mass., 505; Hoadley *vs.* North Trans. Co., 115 Mass., 304; Monitor Ins. Co. *vs.* Buffum, 115 Mass., 343; Germania Ins. Co. *vs.* Memphis R.R., 72 N. Y., 90.) This rule is as applicable to contracts for the carriage of persons or property as to contracts of any other kind. (Grace *vs.* Adams, 100 Mass., 505; B. & M. R.R. *vs.* Chipman, 146 Mass., 107; Parker *vs.* S. E. R.R., 2 C. P. D., 416, 428; Harris *vs.* Great West. R.R., 1 Q. B. D., 515; York Co. *vs.* Central R.R., 3 Wall., 107; Hill *vs.* Syracuse R.R., 73 N. Y., 351.) The cases in which it is held that one who receives a ticket that appears to be a mere check showing the points between which he is entitled to be carried, and that contains conditions on its back which he does not read, is not bound by such conditions, do not fall within this rule. (Brown *vs.* E. R.R., 11 Cush., 97; Malone *vs.* Boston R.R., 12 Gray, 388; Henderson *vs.* Stevenson, L. R. 2, H. L. Sc., 470; Quimby *vs.* Vanderbilt, 17 N. Y., 306; R.R. *vs.* Stevens, 95 U. S., 655.) Such a ticket does not purport to be a contract which expressly states the rights of the parties, but only a check to indicate the route over which the passenger is to be carried, and he is not expected to examine it to see whether it contains any unusual stipulations. The precise question in the present case is whether the 'contract

ticket' was of such a kind that the passenger taking it should have understood that it was a contract containing stipulations which would determine the rights of the parties in reference to his carriage. If so he would be expected to read it, and if he failed to do so he is bound by its stipulations. It covered with print and writing the greater part of two large quarto pages and bore the signature of the defendant company affixed by its agent, with a blank space for the signature of the passenger. The fact that it was not signed by the plaintiff was immaterial. (*Quimby* vs. *Boston & Maine R.R.*, 150 Mass., 365, and cases there cited. It contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day in the week. No one who could read could glance on it without seeing that it undertook expressly to prescribe the particulars which would govern the conduct of the parties until the passenger reached the port of destination. In that particular it was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. In reference to this question, the same rules of law apply to a contract to carry a passenger as to a contract for the transportation of goods. There is no reason why the consignor who is bound by the provisions of a bill of lading which he accepts without reading should not be equally bound by the terms of a contract in similar form to receive and transport him as a passenger."

And the Court of Appeals of New York in the *Steers* case said:

"In the case of *Belger* vs. *Dinsmore* (51 N. Y., 166), it was decided that in the absence of fraud, concealment or improper practice, the legal presumption is that stipulations limiting the common-law liability of common carriers, contained in a receipt given by them for freight, were known and assented to by the party receiving it. In that case the decision in *Blos-*

som vs. *Dodd* (43 N. Y., 264) was examined and shown to be entirely consistent with the conclusion arrived at. I do not perceive any distinction growing out of the fact, that in the case before us the subject was the transportation of a passenger and her baggage, which can render the decision inapplicable. The plaintiff, by her agent, was an applicant for a passage to Europe by the defendant's ship, the voyage to be commenced at a future day, and received on payment of the price a written engagement from the defendant expressing its undertaking. A printed *fac-simile* of this paper is before us, and although part of it is in smaller type than the rest, no part of it is in such type as to suggest to the mind the idea of concealment as the possible motive for its being thus printed. It is all printed on one side of the paper, and all the printed matter precedes the signature of the agent of the defendant. That the plaintiff herself never read the paper is of no moment. The arrangement was made by her agent, who must be presumed to have acquainted himself with the terms of the engagement which the defendant assented to. Looking to the course of business, the Court may take notice that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight. There is, therefore, no room in such a case for the suggestion that the party is surprised into a contract, when he supposes himself only to be taking a token indicative of his right. The paper in evidence ought, therefore, to be regarded as having received the mutual assent of the parties, and as being, as its language purports, their contract touching the voyage in question."

This ticket belongs to a class of unilateral contracts of which there are many in use, viz.: Bills of lading, blanks for telegraph messages and policies of insurance. We can conceive no reason why the holder of either of these documents is bound without reading or knowing its provisions when he took it; and yet the holder of a ticket for

transportation across the ocean is not. In truth the transaction of business would be greatly embarrassed by such a ruling, because the carrier, though offering a contract in its nature reasonable, would find that his rights depended upon whether the purchaser of the contract was literate or illiterate, or was a foreigner who could not understand the language; and would be greatly exposed to unconscientious claims, because he never could prove that the holder had read, or if he had read had understood, the provisions of the contract. Must the carrier print for the foreigner in his own language or translate the English to him, read to the uneducated, and, when all is done, be at the risk of being misunderstood?

> "II.—Does the following language, in a ticket purchased in Paris, France, for the transport of a passenger from Antwerp, Belgium, to the City, County and State of New York, upon an ocean steamship, release the steamship from liability in a suit in admiralty *in rem* brought by the passenger, assuming that the Belgium law does not forbid such a contract?
>
> "The shipowner, or agent, shall not, under any circumstances, be liable for any loss or delay of or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor, and freight paid in advance on the excess value at the rate of one per cent., or its equivalent, in which case the shipowner shall only be responsible according to the terms of the shipowner's form of cargo bill of lading in use from the port of departure. All questions arising hereunder are to be settled according to the Belgium law."

The same criticism is to be made upon the last sentence as was made in the foregoing article.

No one who reads this clause can be in any doubt that it was intended to apply to the shipowner and his property

as well. The agent is separately mentioned because, having signed the contract, he might be personally liable. It is not to be inferred from this that it was intended to leave the shipowner's property liable. No doubt, contracts can be made whereby a man is relieved from liability, and yet all his property, or a particular piece of his property, subjected to it; but precise and unmistakable language would be required to produce so singular a result. To read the clause of the contract in this way would not be to construe it, but to nullify it. An exemption of the shipowner would be perfectly valueless if his vessel is subjected for the same claim to a maritime lien. A lien arises in the case of a maritime contract only as an incident of personal liability of the contractor, and if his personal liability be released, it stands to reason that the lien is. Could it, for instance, be contended that if these passengers had executed a release to the Steamship Company, without mentioning the steamship, for a valuable consideration, that they then might turn around and prosecute the same claim against the vessel? When the parties have agreed that for any particular claim the contractor shall not be liable, obviously his property cannot be liable for it. The whole contains the parts.

There is no conflict between the law as laid down by the Circuit Court of Appeals and the law as laid down in the State Courts on this subject. On the contrary, the District Court, whose opinion was affirmed, followed the decision of the Court of Appeals in the case of *Steers* vs. *the Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y., 1, which was a decision on substantially the same ticket as is now before the Court.

"III. Does the Harter Act—viz., Chapter 105 of the laws passed by the fifty-second Congress at its twentieth session, which is published in volume 27 of the statutes at large at page 445—apply to and regulate

the liability in admiralty of an ocean steamship which transports from Antwerp, Belgium, to the City, County and State of New York, trunks, which are the property of a passenger upon said steamship when the contract between the passenger and the steamship, its owner and agent, is embraced in a document called a ticket, in print and manuscript form, signed by the agents of the owners of the steamships and also in a receipt for said ticket in the following language:

"Total fr.

"Weight, contents and value unknown and shipped by the Red Star Line steamer, subject to the conditions contained in the Co's ticket and bill of lading.

"Red Star Line.
"Caisse.

"Antwerp, Dec. 97."

Judge Brown, of the District Court of the United State for the Southern District of New York, held in the "*Rosedale and Oregon*," 88 Fed. Rep., 324, lately affirmed in the Circuit Court of Appeals, 92 Fed. Rep., 1021, that this Act did not cover contracts for the carriage of passengers and their baggage. The statute both in Sections 1, 2 and 4 speaks merely of provisions in "bills of lading or shipping documents" for the transportation of "merchandise and property."

The ticket in this case certainly does not fall within the words "bill of lading or shipping document," used in Sections 1, 2 and 4 of the Harter Act. These are expressions perfectly well understood in commerce, and apply to bills of lading covering trade shipments, which are almost invariably insured. That Congress meant by the words "bill of lading or shipping document" but one thing, namely, bill of lading, appears from the language of Section 5, which provides a penalty for refusing to issue on demand "the bill of lading herein provided for,"

and does not mention the words "shipping document" at all.

On the other hand, for personal baggage accompanying the passenger no bill of lading or shipping document is, so far as we know, ever given. If the libellants had intended their personal baggage to fall within the provisions of the Harter Act, they could have accomplished it, as provided in the ticket itself, by declaring the value of the baggage over 250 francs, paying freight on the excess and getting a bill of lading. Not having done so, it remains baggage, and it does not lie in their mouths now to say that it is property or merchandise within the meaning of the Harter Act.

It is respectfully submitted that the petition herein should be denied.

ROBINSON, BIDDLE & WARD,
Proctors for the
International Navigation Company.

HENRY GALBRAITH WARD,
Advocate.